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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Communications Assistance for )  
Law Enforcement Act )

CC Docket No. 97-213

To: The Commission

**COMMENTS OF THE CELLULAR TELECOMMUNICATIONS**  
**INDUSTRY ASSOCIATION**

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### SUMMARY

In these comments, the Cellular Telecommunications Industry Association ("CTIA") urges the Commission to take immediate steps to ensure cost-effective and timely implementation of the Communications Assistance for Law Enforcement Act ("CALEA").

First, in its July 1997 Petition, CTIA asked the Commission to enact the industry consensus surveillance standard as a rule and to extend the October 1998 CALEA compliance deadline for two years thereafter to permit manufacturers to develop standard solutions for carriers to implement. While the industry has since promulgated a CALEA safe harbor standard, it is still necessary that the Commission act on the CTIA Petition to grant a blanket industry extension because CALEA-compliant technology will not be available within the compliance period.

Further, Section 107 of CALEA permits the Commission to grant an extension of the compliance date, but the Commission has not correctly articulated the standard for doing so in the NPRM. The correct standard is whether the technology necessary for compliance is commercially available and if so, whether it is reasonably achievable to implement it. If technology is not commercially available, an extension should be granted. If technology is commercially available, the

Commission should consider, using CALEA Section 109(b) factors, whether compliance is "reasonably achievable." Once an extension request is timely filed, the compliance date should be tolled automatically until the Commission takes final action.

CALEA compliance is not reasonably achievable under Section 109(b) if it would impose significant difficulty and expense on a carrier. CALEA compliance is not reasonably achievable under any circumstance if CALEA-compliant hardware and software are not commercially available. In considering any "reasonably achievable" petition, the Commission must ensure that CALEA costs to consumers are kept low, there is no gold-plating of law enforcement demands, privacy is protected, competition is not adversely impacted by ensuring that implementation is fair and even throughout the industry, and the introduction of new technologies, products and services into the market is not adversely affected.

The Commission should affirm its view that all classes of telecommunications carriers fall within the CALEA definition of telecommunications carrier if they offer telecommunications services to the public and provide the subscriber with the ability to originate, terminate or direct communications. To follow the express intent of Congress, all information services, whether or not provided by a common carrier, should

be excluded from CALEA requirements, particularly because of the potential to impose unfair regulatory burdens on carriers providing information services while those exclusively providing information services are relieved from any obligations under CALEA.

CTIA urges that the carrier security procedures adopted under Section 229 be minimal and require only that carriers have policies to ensure that lawful interception is received before wiretaps are executed. The Commission should not impose burdensome recordkeeping requirements on carriers and it should be enough to require that carriers maintain confidentiality of such documents. CTIA believes that all carriers, not just small carriers, should be able to demonstrate compliance with the Section 229 requirements by certification to the Commission.

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ASSOCIATION**

The Cellular Telecommunications Industry Association ("CTIA")<sup>1</sup> submits these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") for implementation of the Communications Assistance for Law Enforcement Act ("CALEA").<sup>2</sup> Specifically, CTIA will address (1) the standard that the Commission must apply in granting an extension of the CALEA compliance date and the appropriateness of doing so at this time; (2) the factors the Commission must consider when considering any petition for a determination

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<sup>1</sup> CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers, and includes forty-eight of the fifty largest cellular and broadband PCS providers. CTIA represents more broadband PCS carriers and more cellular carriers than any other trade association.

<sup>2</sup> 62 Fed. Reg. 63302 (Nov. 28, 1997).

that compliance with the capability requirements of CALEA is not reasonably achievable; (3) the scope of the definition of telecommunications carrier under CALEA; and (4) the Commission's proposed carrier security rules.

The Commission also has decided not to address in this NPRM<sup>3</sup> CTIA's pending petition for a technical standards rulemaking and an industry wide extension of the CALEA compliance date.<sup>4</sup> An interim standard for implementation of the assistance capability requirements of CALEA has been promulgated by industry under the auspices of the Telecommunications Industry Association ("TIA"). However, the Commission will still need to address the part of the CTIA Petition that requests an industry wide extension of the October 25, 1998 compliance date to allow manufacturers to develop solutions for carriers to implement. Thus, the CTIA Petition still requires Commission action and CTIA comments below in that regard.

**I.  
CURRENT STATUS OF CALEA IMPLEMENTATION**

CTIA supports cost-effective and timely implementation of

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<sup>3</sup> NPRM, ¶ 44.

<sup>4</sup> See In the Matter of Implementation of Section 103 of the Communications Assistance for Law Enforcement Act, Petition for Rulemaking, Cellular Telecommunications Industry Association Petition (Jul. 16, 1997) (hereinafter the "CTIA Petition").

CALEA's requirements. CTIA supports this goal not only because, as another regulatory mandate, compliance has a direct financial impact on CTIA members and on the growth of the wireless industry, but because CTIA and its members always have cooperated with law enforcement in the conduct of electronic surveillance and in many other law enforcement initiatives. This is why CTIA has been at the fore of the industry, leading the way to bring CALEA capabilities to the street as soon as possible.

The CTIA Petition sets forth in detail the industry's good faith effort to produce a standard to implement the capability requirements of CALEA.<sup>5</sup> It was CTIA's view then and now that law enforcement was using the standards process to seek capabilities not required by CALEA and that, inappropriately, law enforcement was attempting to block promulgation of any standard.

However, because CALEA specifically prohibits law enforcement from requiring any specific design or system configuration for CALEA implementation,<sup>6</sup> CTIA urged, and TIA's TR45.2 Subcommittee agreed, that the proposed industry standard should be published by TIA as an interim standard

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<sup>5</sup> CTIA Petition at 8-12.

<sup>6</sup> 47 U.S.C. § 1002(b)(1).



("IS").<sup>7</sup> By the time the Commission receives these NPRM comments, TIA will have published the IS.

The TR45.2 Subcommittee also agreed with the CTIA recommendation that TIA publish the proposed industry standard as a full American National Standards Institute ("ANSI") document.<sup>8</sup> However, law enforcement objected to publication of any standard and continues to claim that the standard is deficient because it does not contain all of the surveillance capabilities they desire.<sup>9</sup> Thus, the IS remains under a cloud even though the FBI has not brought a deficiency petition before the Commission.<sup>10</sup>

CTIA has taken the lead in an effort to resolve the disagreement with law enforcement over the scope of CALEA.

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<sup>7</sup> See TIA Press Release dated Dec. 5, 1997 (attached hereto as Tab A).

<sup>8</sup> Id. Also, a copy of CTIA's letter to TIA, urging that the industry standard be published as an ANSI standard is attached hereto as Tab B. If TIA concurs, then the IS would be withdrawn and the ANSI standard would be in place.

<sup>9</sup> Id.

<sup>10</sup> CALEA provides that if a government agency or any other person believes that industry standards are deficient, that agency or person may petition the Commission to establish by rule new standards after consideration of certain enumerated factors. 47 U.S.C. § 1006(b). The threat of a deficiency action, of course, was the main reason for the CTIA Petition coupled with CTIA's desire to resolve the disagreement over the scope of CALEA sooner rather than later, especially given the October 1998 compliance date.

CTIA recently proposed that industry and law enforcement cooperate to develop an enhanced surveillance services ("ESS") standard for all of the exotic capabilities law enforcement had hoped to force into the industry standard.<sup>11</sup> Law enforcement could order these capabilities on an a la carte basis, paying for them as needed, and industry could ensure that the desired information would be delivered in a uniform manner.<sup>12</sup>

Carriers and manufacturers also have been discussing the possibility of entering into cooperative agreements with the FBI to determine the cost of developing and implementing the IS and the enhanced features. These discussions included the basic understanding that an extension of the CALEA compliance date would be required in any event. Recently, however, the FBI informed industry that unless its enhanced surveillance needs were included in any agreement to deploy CALEA solutions, the FBI would oppose an extension for that carrier or manufacturer.<sup>13</sup>

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<sup>11</sup> See Letter from T. Wheeler, CTIA, to S. Colgate, DOJ, dated Nov. 12, 1997 (attached hereto as Tab C).

<sup>12</sup> In making this offer, CTIA recognized that an ESS standards process still may not yield the desired capabilities because of their complexity or cost. Each of the enhanced capabilities present technical challenges and may be too costly for law enforcement ever to purchase.

<sup>13</sup> The implications of the FBI's position are clear. While the IS will provide a safe harbor to manufacturers and

Against this backdrop, it should be patently clear why CTIA's pending petition for a blanket industry extension requires Commission action. It should also be clear that carriers and manufacturers will be seeking extensions of time under CALEA Section 107 and, as CTIA discusses below, that Commission procedures should be established to handle such petitions, particularly in regard to the Commission consultation procedures with the FBI on such petitions.<sup>14</sup>

## **II. DISCUSSION**

In the following sections, CTIA addresses (A) extension of the compliance date, (B) reasonable achievability standards, (C) the definition of telecommunications carrier and (D) carrier security procedures.

### **A. CALEA COMPLIANCE DATE EXTENSION REQUESTS**

#### **1. The Correct Section 107 Standard and the Effect of the Industry Standard on Available Technology**

The Commission spends but two paragraphs in the NPRM on what arguably is, next to the scope of the capabilities required by CALEA, the most important issue to carriers and

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carriers that are in compliance with it, there is no way to so comply by October 25, 1998. Thus, there will be a gap in the safe harbor during which manufacturers and carriers would be subject to law enforcement suit and potential civil penalties of \$10,000/day for each violation.

<sup>14</sup> 47 U.S.C. § 1006(c)(2).

manufacturers.<sup>15</sup> And in doing so, the Commission fails to articulate the correct standard for granting an extension.

Section 107(c)(2) provides as grounds for an extension:

The Commission may, after consultation with the Attorney General, grant an extension under this subsection, if the Commission determines that compliance with the assistance capability requirements under section 103 is not reasonably achievable through application of technology available within the compliance period.<sup>16</sup>

Congress intended, as Section 107(c) plainly states, that carriers should be granted an extension of the CALEA compliance date if the technology necessary for compliance is not commercially available. Whether equipment, facilities or services are commercially available should turn on whether the carrier's vendor has developed and is able to make available the necessary CALEA technology.

The practical effect of the lack of technical standards to date is that the wireless industry will be unable to meet the October 25, 1998 compliance deadline. There is no CALEA-compliant equipment, facilities or services available from vendors today. Thus, there is no doubt that the Commission will receive many extension requests from the wireless

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<sup>15</sup> NPRM, ¶¶ 49-50.

<sup>16</sup> 47 U.S.C. § 1006(c)(2) (emphasis added).

industry in the coming months. These points were raised by CTIA in the CTIA Petition and bear repeating here:

The Commission should be aware that Section 107(c) of CALEA provides that a telecommunications carrier may petition the Commission for one or more extensions of the deadline for compliance with the capability requirements of CALEA. 47 U.S.C. § 1006(c). The Commission may grant an extension if it determines that compliance is not reasonably achievable within the compliance period. 47 U.S.C. § 1006(c)(2). The absence of a standard a fortiori means that compliance is not "reasonably achievable through application of technology available within the compliance period." Thus, if the Commission acts promptly on CTIA's request, it may avoid hundreds of extension requests under Section 107(c) in the very near future as carriers and manufacturers seek to protect themselves from enforcement action that could otherwise be brought.<sup>17</sup>

Thus, the Commission should take steps immediately to extend the compliance date by two years.

**2. Section 109 "Reasonably Achievable" Factors and Other Factors for Consideration**

Once the Commission has determined whether CALEA-compliant equipment, facilities or services are available, it must then consider whether compliance is "reasonably achievable." CTIA agrees with the Commission that CALEA Section 109(b) "reasonably achievable" factors should be considered as the basic criteria for granting the request.

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<sup>17</sup> CTIA Petition at 14 n.7.

There are additional factors not specified in Section 109(b) that warrant consideration. For example, the Commission should consider whether the intercept can be performed elsewhere. In the case of a commercial mobile radio service, it may be possible to have an interception performed by a local exchange carrier at the switch. Another factor is the good faith and diligence of the carrier in working to achieve CALEA compliance. Circumstances beyond a carrier's control, such as delays in equipment delivery or technical problems, that prevent timely compliance in instances where a carrier has been working in good faith to comply should permit the carrier to obtain an extension.<sup>18</sup>

### **3. FBI Consultation on the Record**

Section 107(c) provides for consultation by the Commission with the FBI in its consideration of an extension, but does not state whether this consultation should be on the record.<sup>19</sup> Congress plainly intended that CALEA be implemented in an open fashion. For example, when discussing Section 107(b) petitions for rulemaking, Congress stated:

This section is also intended to add openness

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<sup>18</sup> These are the same factors that a court would consider in any enforcement action as well under Section 108 of CALEA. 47 U.S.C. § 1007.

<sup>19</sup> The Attorney General has delegated her authority under CALEA to the FBI. 60 Fed. Reg. 11906 (1995) (to be codified at 28 C.F.R. pt. o).

and accountability to the process of finding solutions to intercept problems. Any FCC decision on a standard for compliance with this bill must be made publicly.<sup>20</sup>

To avoid even the appearance of undue influence, the Commission should disclose on the record FBI participation in the factual analysis and any final decision. FBI participation should be made available in advance of any decision where possible to permit the applicant for any extension to respond to the comment. The Commission should make express findings of fact on each issue and make these findings publicly available in a written decision.

#### **4. Tolling the Compliance Date**

If the Commission does not grant a blanket extension of the compliance deadline, it should state in this NPRM proceeding that any Section 107(c) petition will toll the compliance deadline automatically if the petition is timely filed.<sup>21</sup> In addition, if any petition is denied in whole or in part, the Commission will need to establish terms and conditions for compliance during the transition. The Commission should make clear that the compliance deadline is

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<sup>20</sup> H.R. Rep. No. 103-827 (1994), reprinted in 1995 U.S.C.C.A.N. 3489, 3507 (hereinafter "House Report").

<sup>21</sup> The Commission could set a deadline for extension requests in advance of the compliance deadline in order to discourage use of a petition for extension to gain additional time to comply when a carrier has neglected to take steps toward compliance.

tolled during any such transition period.

**B. "NOT REASONABLY ACHIEVABLE" PETITIONS**

Section 109(b) is the CALEA "safety valve" for carriers and manufacturers. Congress made clear that CALEA was not to be implemented at any cost, but rather, the hallmark of CALEA was to be a balanced approach. If compliance would impose significant difficulty or expense on a carrier or the users of its systems, Congress empowered the Commission to relieve the petitioning party from the obligation to provide the otherwise CALEA-mandated capabilities.<sup>22</sup>

Section 109(b) of CALEA provides that a telecommunications carrier or any other interested person may petition the Commission to determine that compliance with Section 103 capability requirements is not "reasonably achievable."<sup>23</sup> CALEA does not define the term "reasonably achievable," but it does provide certain mandatory factors that the Commission must consider in its determination. But before even addressing these specific factors,<sup>24</sup> current circumstances may require the Commission to make a threshold

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<sup>22</sup> 47 U.S.C. § 1008(b).

<sup>23</sup> Id.

<sup>24</sup> Of course, the same question could be asked as part of Factor (K) - Other Factors the Commission Determines Are Appropriate.



determination on whether compliance is reasonably achievable in the absence of commercially available hardware or software that meets the industry's safe harbor standard.

**1. Reasonably Achievable Compliance Requires Commercially Available, CALEA-Compliant Hardware and Software**

If CALEA compliance is to be reasonably achievable, hardware and software developed to comply with a uniform industry technical standard is essential. As Congress noted in passing CALEA:

It is obviously much more economical to design the wiretapping access into the new equipment and services rather than to engage in after-the-fact and expensive retrofits. That requirement will, therefore, be part of the law.<sup>25</sup>

The Commission should acknowledge that the absence of CALEA-compliant, commercially available hardware and software means that compliance is not reasonably achievable.

**2. Section 109(b) Factors**

The Commission has requested comments on the factors that are to be considered in determining whether compliance is reasonably achievable and how these factors should be applied. Underlying all of these factors are several important policy goals set by Congress that the Commission must honor in

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<sup>25</sup> House Report at 3515 (Additional Views of Representatives Don Edwards and Rick Boucher).

reaching a determination: (i) ensure CALEA costs to consumers are kept low, (ii) meet the legitimate needs of law enforcement while preventing "gold-plating" of law enforcement's demands, (iii) protect privacy interests and (iv) ensure that competition in all forms of telecommunications is not undermined, ensuring that wiretap compliance is neither used as a sword or a shield.<sup>26</sup>

**Factor (A):      Effect on Public Safety and  
National Security**

Wireless wiretaps accounted for less than 25% of all wiretaps conducted in 1993. The wireless share of wiretaps has grown, according to the government's 1996 Wiretap Report, to exceed 34% of all federal wiretaps conducted. Obviously, wiretaps are being conducted successfully in the wireless environment and will continue to be conducted into the future. CALEA ensures continued law enforcement access to call content despite the increasing technological sophistication of services, but Congress did not assume that such advances meant wiretapping would come to an end absent upgrades. So the first question the Commission should ask under this factor is whether or to what extent basic call content and call-identifying information will be provided to law enforcement absent compliance with Section 103. If basic wiretapping

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<sup>26</sup> 140 Cong. Rec. 10771, 10781 (Oct. 4, 1994) (comments by Rep. Markey).

services will continue, the Commission is free to determine that compliance is not reasonably achievable.

Second, there is a geographic component to the factor. If the historical baseline of wiretaps shows very limited surveillance activity, the Commission would be right to balance law enforcement's perceived need in the geographic area with the cost to the carrier and customer of requiring the CALEA upgrade. It would be difficult to justify CALEA upgrades in many rural service areas, for example, which have had no wiretaps.

Third, even if CALEA-compliant hardware or software is available, some carriers may find the cost of buying the upgrades prohibitive. The Commission may be asked to consider a stripped-down version of the industry standard. For example, it is generally agreed that the major impetus for CALEA was the inability to track forwarded calls. Under this factor, the Commission could find reasonably achievable a call-forwarding surveillance service only and require law enforcement to reimburse the carrier for anything additional under or outside of the industry safe harbor standard.

**Factor (B):      Effect on Basic Residential  
                    Telephone Service Rates**

CALEA compliance should have a minimal effect on basic

residential telephone service rates.<sup>27</sup> In looking at this factor, the Commission must determine the impact upon rates from both increased capital and increased operating costs. If increases due to CALEA drive the rates beyond what customers are willing to pay for a wireless service, it is appropriate for the Commission to find that compliance is not reasonably achievable. It was the sense of Congress that CALEA should not stifle the deployment of new technologies and services; rather, in cases where the costs are out of line with the benefit, the costs of compliance would be shifted to the public at large rather than the carrier's subscribers.

**Factor (C):     The Need to Protect the Privacy  
                  and Security**

The dispute over the last year between law enforcement and the telecommunications industry has included discussion not only of the scope of CALEA but also about the lawfulness of some of the features, services or capabilities desired by law enforcement. The privacy of a customer's communications always has been important to the wireless industry and CTIA, for example, has taken the lead in fighting unlawful cloning and scanning of communications. No implementation of CALEA should jeopardize the privacy of communications not authorized to be intercepted.

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<sup>27</sup> See House Report at 3515 (Statement of Rep. Edwards and Rep. Boucher).

**Factor (D): Cost-Effective Implementation**

It is difficult to generalize about the nature of carrier petitions under Section 109 but one thing seems clear - no wireless carriers will be able to provide all of the services or features or capabilities desired by law enforcement by October 25, 1998. Even if CALEA-compliant equipment or software becomes available, some system configurations may not permit certain capabilities to be implemented cost-efficiently or without significant redesign. In these cases, an alternate implementation will be required and the Commission will have to prioritize among different surveillance services. Law enforcement, to the extent it files comments on a petition, should be required to state its priorities on the record.

**Factor (E): Nature and Cost of the  
Equipment, Facility, or Service**

Manufacturers and service support providers are required to make CALEA-compliant products available to carriers at a reasonable charge.<sup>28</sup> The Commission may have to determine what a reasonable charge is at the request of wireless carriers or manufacturers who find through the development process that the price of their product, and therefore their competitiveness, cannot bear the increase in cost due to CALEA.

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<sup>28</sup> 47 U.S.C. § 1005(b).

**Factor (F): Operational Impact**

Carriers and manufacturers alike have spent significant resources to optimize their networks and services. The Commission should not accept a degradation in service as a cost of implementing CALEA. For example, an implementation for surveillance involving data packet interceptions that would result in a significant reduction in packet processing time should not be required under CALEA. Similarly, any proposal that elevated surveillance above call processing should be rejected.

**Factor (G): U.S. Policy to Encourage New Services**

CALEA should not prevent new technologies and services in commercial mobile radio services from being made available to the public. The development of new wireless technologies and services is an expensive and risky process. For these new technologies and services, the added costs of CALEA compliance could make a new venture unprofitable and force carriers to abandon less profitable investments in new wireless services. Congress explicitly recognized that one factor that must be considered in determining whether compliance is reasonably achievable is "the cost to the carrier of compliance compared to the carrier's overall cost of developing and deploying the

feature or service in question."<sup>29</sup>

Congress obviously was concerned with negative impacts that CALEA might have on innovation in telecommunications and did not intend for CALEA to diminish the impact of other regulatory policies that have served to promote competition and innovation. Such policies as regulatory parity for commercial mobile radio services and facilitation of interconnection among carriers have fostered increased competition and the rapid introduction of new technology and services.

New telecommunications technologies and services produce enormous economic benefits because enhanced telecommunications services allow businesses to function more efficiently and innovative products and services allow American businesses to export technology and expertise overseas. Having these economic benefits in mind, Congress gave the Commission clear direction on this issue: "The Committee's intent is that compliance with the requirements in the bill will not impede the development and deployment of new technologies."<sup>30</sup> To the extent that CALEA becomes a barrier to market entry, whether for new carriers or products, compliance should be regarded as

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<sup>29</sup> House Report at 3499.

<sup>30</sup> Id.

not reasonably achievable.

**Factor (H): Financial Resources of the Carrier**

The Commission must weigh the financial resources of a wireless carrier, including the availability and cost of capital to the wireless industry and the financial health of the individual company, in making its determination of whether CALEA compliance is reasonably achievable.

The costs of CALEA compliance should not mean financial ruin for a wireless carrier. The wireless industry is facing enormous competitive and financial pressures. Wireless carriers have had to spend large sums of money to acquire spectrum in auctions and the difficulty in obtaining capital has been demonstrated by the PCS auction winners who are now in bankruptcy. Where once a large number of smaller carriers could pay for spectrum in installment payments, that option is no longer available to future auction winners and all carriers are having to make large upfront payments years before they will reap any benefit from the new spectrum. At the same time, carriers who acquire spectrum are required to build out this spectrum over a set period of time and will be requiring large amounts of capital for basic infrastructure even though demand for services may be limited in the short run. Therefore, even companies that are currently strong may find their financial resources severely strained in the future as



they invest in these build-outs.

As new spectrum for wireless services is being built out, the competition in the market to provide wireless services has become especially keen. Competition has meant that carriers have been forced to lower prices. Competition also limits the ability of carriers simply to pass through the costs of CALEA compliance to their customers. If there is no place for carriers to absorb the additional costs of CALEA compliance, it would be appropriate for the Commission to find that compliance is not reasonably achievable.

**Factor (I): Competition**

The cost of CALEA compliance for wireless carriers is extraordinarily expensive and can affect the competitive position of carriers if certain carriers must absorb the costs while other carriers are relieved of these burdens. Thus, the Commission should strive to ensure competitively neutral decisions, especially between carriers operating in the same markets.

In passing CALEA, Congress emphasized that it is national policy to promote competition in the telecommunications industry and to support the development and widespread availability of advanced technologies, features and services and that the implementation of CALEA was not to impede such